

VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:)	
)	DOCKET NO. 13-23
RICHARD GALLOW)	

MEMORANDUM AND ORDER

The issue before us is whether to grant a motion filed by the Vermont State Employees' Association on August 22, 2013, on behalf of Richard Gallow ("Grievant") to hold discovery in abeyance in this matter. This grievance contests the dismissal of Grievant from his state correctional officer position. Grievant filed the motion to hold discovery in abeyance pursuant to Rule 26(d) of Vermont Rules of Civil Procedure, as incorporated by Section 12.1 of Board Rules of Practice. Rule 26(d) provides:

Sequence and Timing of Discovery. Unless a Superior Court Judge upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

Grievant contends that a stay of discovery should be granted for the convenience of the parties and in the interests of justice. Grievant asserts as grounds for the motion that he currently is being criminally prosecuted for the same alleged conduct that gave rise to his discharge and which is the subject of this grievance. Due to these circumstances, Grievant contends that the parties' efforts to engage in discovery activities will be hampered by his need to assert his privilege against self-incrimination. Moreover, Grievant indicates that, if he is convicted of the criminal charges, the grievance is likely to be withdrawn so that any discovery engaged in by the parties in the interim will have been a waste of the parties' time, energy and resources. Grievant requests that all

discovery be held in abeyance until the completion of the pending criminal prosecution against Grievant.

The State filed a memorandum in opposition to the motion on September 4, 2013. The State points out in its memorandum that Grievant was dismissed both for conduct for which he had been criminally charged and for other incidents for which he had not been criminally charged. The State contends that it would be inconvenient for the State to stay discovery because it cannot prepare a defense or otherwise evaluate the merits of Grievant's claims if it is denied the right to discover the factual bases of these claims.

The State contends that Grievant's claim that discovery efforts will be hampered by Grievant's need to assert his Fifth Amendment privilege against self-incrimination is defeated by the Vermont Supreme Court holding that the Fifth Amendment does not mandate a stay of civil proceedings pending the outcome of similar or parallel criminal proceedings, and that the party seeking the stay is merely put to the constitutionally acceptable choice of whether to testify or remain silent. In re Crystal Hudson, Sup.Ct.Doc.No. 2007-283, Unpublished Entry Order (May 2008); *citing* Jacksonville Savings Bank v. Kovack, 762 N.E. 1138, 1141 (Ill.App.Ct.. 2002); In re Hotel & Rest. Employees & Bartenders Int'l Union Local 54, 496 A.2d 1111, 1133-34 (N.J. Super.Ct.App.Div., 1995). The State maintains that, if the State's discovery requests elicit responses from Grievant that may incriminate him for criminal conduct, he may assert his Fifth Amendment privilege and decline to answer. Alternatively, if the response would not incriminate him of a crime, the State asserts there is no Fifth Amendment implication and Grievant should respond as required by Board *Rules of Practice* and the Vermont Rules of Civil Procedure.

We concur with the State that discovery should not be held in abeyance in this matter. We conclude that it best meets the interests of justice to allow discovery to proceed even though it is likely that it cannot be completed until the completion of the pending criminal prosecution against Grievant. In the interim, it is evident that it would be productive and efficient to have the State and Grievant gather information pertinent to this grievance that does not implicate Grievant's privilege against self-incrimination.

In responding to the State's discovery requests, Grievant may assert his Fifth Amendment privilege and decline to answer. If Grievant does not assert his Fifth Amendment privilege, Grievant should respond as appropriate pursuant to the Board *Rules of Practice* and the Vermont Rules of Civil Procedure. In instances where Grievant asserts his privilege against self-incrimination in response to a question, we will require him to supplement his responses upon the completion of the pending criminal prosecution against Grievant pursuant to V.R.C.P. 26(e)(3).

This will allow discovery to proceed in a more efficient, time-effective manner than if we ordered that discovery be held in abeyance. The parties will be able to gather information now while accommodating Grievant's privilege against self-incrimination. This ultimately will allow for a quicker hearing on the merits of this grievance than would be the case if we ordered that discovery be held in abeyance. We note in this regard that the Reporter's Notes to V.R.C.P. 26(d) states: "The rule, by eliminating any blanket rule as to sequence and priority of discovery, is intended to assure maximum flexibility in the procedure." This intent is reflected in the flexibility of the procedure we are adopting in this decision.

Based on the foregoing reasons, it is ordered:

1. Grievant's motion to hold discovery in abeyance is denied;
2. In responding to the State's discovery requests, Grievant may assert his Fifth Amendment privilege against self-incrimination and decline to answer;
3. If Grievant does not assert his Fifth Amendment privilege against self-incrimination, he shall respond as appropriate pursuant to the Board *Rules of Practice* and the Vermont Rules of Civil Procedure; and
4. In instances where Grievant asserts his privilege against self-incrimination in response to a question, he shall supplement his responses upon the completion of the pending criminal prosecution against him pursuant to V.R.C.P. 26(e)(3).

Dated this 21st day of November, 2013, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Richard W. Park

Richard W. Park, Chairperson

/s/ James C. Kiehle

James C. Kiehle

/s/ Gary F. Karnedy

Gary F. Karnedy